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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 445

BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief does not argue the issues in the order in which they were argued in petitioner's original brief. Petitioner's reply brief will deal with respondent's arguments in the order in which the issues were presented in petitioner's original brief.

Statement

In his statement (Br. 3-8) the respondent says of the contracts made by the petitioner with the community groups that they varied "in some particulars" (Br. 4). This is a

marked understatement in view of the wide differences in the provisions of the various contracts pointed out in petitioner's original brief (pp. 3-5).

Respondent also states (Br. 4) that the contract usually contained a provision to the effect that the cash to be paid to taxpayer was to be 'used for the payment of suitable factory building or buildings and equipment thereof' or that payment was to be made to the taxpayer 'so that the same shall be available for paying for the factory buildings and the equipment thereof as the work progresses thereon'". As pointed out on page 5 of petitioner's original brief, only five of the contracts contained a clause to the effect that the contributed money was "to be used" and only three other contracts contained a provision to the effect that the contributed money was to be "available" for the payment of a factory building. Thus, only eight out of the total of sixteen contracts involved contained any such provision as that referred to by respondent.

Although respondent is unable to deny petitioner's statement that four of the contracts did not specify any period of time during which the new or enlarged plant would be required to operate, he contends (Br. 4, footnote 3) that it is "reasonable" to view the payments involved in those four cases "as at least entailing an obligation on the part of the taxpayer to continue the operation of the plant for the remainder of the ten-year period originally agreed to in each case." There is no basis in the record for such guessing.

Respondent states (Br. 5) that "the contracts further provided that, in the event the taxpayer failed to comply with their terms, either the cash payments were to be refunded, or the buildings were to be transferred to the communities." In order to explain away the six instances pointed out on page 4 of petitioner's original brief in which the contracts contain no obligation for any re-

payment of funds or re-transfer of property, respondent states (Br. 5, footnote 4) that these six contracts were "in connection with an addition or an extension of an existing factory." That comment proves nothing and does not establish an implied obligation to repay or re-transfer because none existed in those six contracts.

I. The Invested Capital Issues

Respondent's argument of the invested capital issues is found at pages 28 to 69, inclusive, of its brief.

1. *The Contribution to Capital Argument*

Respondent first avoids the issue by assuming that the contributions here involved are not "contributions to capital" within the meaning of Section 113(a)(8) of the Internal Revenue Code, and then reasons that such contributions are not includable in equity invested capital under Sections 718(a)(1) and (2) of the Internal Revenue Code (Br. 32). The reasoning would be true if respondent's assumed premise were correct, but it is not correct.

Respondent next argues (Br. 33-37) that equity invested capital is limited to amounts paid in by shareholders because Congress used in Sections 718(a)(1) and (2) the phrase "money paid in" and "property paid in", stating (Br. 34) that the expression "paid in" refers only to what is "put in" a business by a person making an investment. The nonstockholder who gives up all title to the money or property as a contribution to the corporation, in the manner that the contributors in the instant case did, "puts in" or "pays in" his money just as permanently and just as conclusively as does the stockholder.

The respondent contends that the term "capital" as used in Sections 718 (a)(1) and (2) refers only to the capital as defined in the corporation's charter and paid in by its stock

holders so that "there can be no 'contribution to capital' unless a deficit therein exists, that is to say, unless there is an impairment of capital" (Br. 35). He repeats later (Br. 37) that "a contribution to capital" can have a separate meaning when construed as reaching additional property paid in as a contribution to capital "where there is an impairment in capital". The respondent does not support his contention (Br. 35-37) by any authority and there is no authority to support him. Petitioner's capital was not impaired since it always had accumulated earnings and profits in excess of $971,031.01 (R. 129).

In order to explain away the continued use, in the Regulations promulgated both under Section 113(a)(8) of the Internal Revenue Code and corresponding sections of the prior Revenue Acts, and those under Section 718 of the Internal Revenue Code, of the term "contribution to capital" as representing a contribution acquired "from any person", the respondent argues (Br. 38-40) that the phrase "from any person" should be interpreted to mean from a shareholder (Br. 33, 34, 35, 45, 50, 52) or "some other person having a proprietary interest in the corporation, such as the holder of some hybrid security of a corporation which is not classifiable as stock, or perhaps even a bond holder" (Br. 39, 40). If the Regulations had intended any such limitation, they would have said so.

Thus, in order to give effect to respondent's contention, this Court is asked to interpret Sections 718(a)(1) and (2), I.R.C., as if they read as follows, the additional language required by respondent's interpretation being italicized:[1]

> "(1) MONEY PAID IN. Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital, *(which means a contribution to the corporation's capital only insofar as there is a deficit therein) made by a stockholder or by some other person having a pro-*

[1] Respondent's brief pp. 39, 40.

prietary interest in the corporation (such as the holder of some hybrid security of the corporation which is not classifiable as stock, or by a bondholder).

"(2) PROPERTY PAID IN.—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid in surplus, or as a contribution to capital (*which means a contribution to the corporation's capital only insofar as there is a deficit therein*) *made by a stockholder or by some other person having a proprietary interest in the corporation (such as the holder of some hybrid security of the corporation which is not classifiable as stock, or by a bondholder).*"[2]

The relevant portion of the Regulations promulgated under Section 718, I.R.C.,[2] would have to be interpreted as if it read as follows, the additional language required in order to give effect to respondent's interpretation being italicized:

"Section 30.718-1 DETERMINATION OF DAILY EQUITY INVESTED CAPITAL—MONEY AND PROPERTY PAID IN.—

If the property was acquired after December 31, 1920, by a corporation from a shareholder as paid in surplus or from any person as a contribution to capital (*which means a contribution to the corporation's capital only insofar as there is a deficit therein*) *made by a stockholder or by some other person having a proprietary interest in the corporation (such as the holder of some hybrid security of the corporation which is not classifiable as stock, or by a bondholder)*, then the basis shall be the same as it would be in the hands of the transferor if the transfer had not been made. (See Section 113(a)(8).)"

The same limitation would have to be read into Section 29.113(a)(8)-1 of Treasury Regulations 111 and the corresponding section of the prior regulations promulgated under Section 113(a)(8) of the Internal Revenue Code and cor-

[2] The text of the regulation is set out on page 78 of petitioner's original brief.

responding sections of the prior revenue acts, in order to give effect to the respondent's contention.

The following observation from page 57 of respondent's brief is peculiarly applicable here:

> "* * * The simple answer is that Congress did not say so. If Congress had intended to so provide, it would have been a simple matter for it to have said so."

If the Treasury Department had intended any such limitation in the Regulations promulgated under Sections 718 and 113(a)(8) of the Code, it certainly would have said so. No reasonable person could be expected to construe the phrase "or from any person as a contribution to capital" to contain the involved limitations argued for by respondent.

This Court has repeatedly stated that Congress must be presumed to have used words in a statute in the "usual, ordinary and everyday meaning of the term", *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 561. Although relying upon the decision of this Court in *Old Colony R. Co.* v. *Commissioner*, *supra*, in another connection [3], the respondent apparently does not agree with the rules of statutory construction summarized by this Court in its decision in that case as follows (p. 560):

> "* * * The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy* v. *M'Cartee*, 6 Pet. 102, 110, 8 L. ed. 334, 337. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence*, 16 How. 251, 261, 14 L. ed. 925, 930. And see *United States* v. *Buffalo Natural Gas Fuel Co.*, 172 U. S. 339, 341, 43 L. ed. 469, 470, 19 S. Ct. 200; *United States* v. *First Nat. Bank*, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 S. Ct. 846;

[3] Respondent's brief p. 48.

Caminetti v. *United States*, 242 U. S. 470, 485, 61 L. ed. 442, 452, L. R. A. 1917F, 502, 37 S. Ct. 192, Ann. Cas. 1917B, 1168. As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, 69 L. ed. 660, 662, 45 S. Ct. 274, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts; *De Ganay* v. *Lederer*, 250 U. S. 376, 381, 63 L. ed. 1042, 1044, 39 S. Ct. 524.'"

In defining invested capital under the World War I excess profits tax, Congress intended to limit invested capital to money or property paid in by the stockholders plus earnings accumulated from past operations and specifically said so.[4] Congress intended to exclude borrowed capital under the earlier law and specifically said so.[5]

In defining the composition of invested capital under the World War II excess profits tax, Congress intended to permit the inclusion of borrowed capital and specifically said so (Sections 717 and 719, I. R. C.).

In defining equity invested capital under the World War II excess profits tax, Congress provided for the inclusion of money or property paid in for stock, or as paid-in surplus, or as a contribution to capital (Sections 718 (a) (1) and (2), I. R. C.). This Court is asked to interpret that definition as limiting a contribution to capital to one made "exclusively" (Br. 45) by stockholders, or at least by holders of some hybrid security or holders of bonds. Respondent's interpretation is contrary to the principles of statutory construction announced by this Court many times. It imputes to Congress and to the Treasury Department (which is entrusted with promulgation of Regulations) a shocking laxity in drafting the highly important invested

[4] Petitioner's original brief, p. 17-19.

[5] Petitioner's original brief p. 18, footnote 14.

capital provisions of the Internal Revenue Code and the Regulations promulgated thereunder. The simple fact is that Congress did not intend to limit invested capital to money or property paid in by stockholders, or by holders of some hybrid security, or by holders of bonds. When it used the term "contribution to capital" as a component of equity invested capital, it obviously intended to include something more than paid-in surplus, and obviously used that term in the sense in which it was then interpreted in the Commissioner's Regulations promulgated under Section 113 (a) (8) of the Internal Revenue Code; namely, as a contribution from any person to the capital of the corporation.[6]

The Treasury Department has at no time in any of its Regulations or rulings, so far as we have been able to find, limited the term "contribution to capital" to stockholders or to an amount necessary to make good an impairment of capital. The respondent's argument on this point is clearly contrary to the decisions of this Court in *Edwards* v. *Cuba R. Co.*, 268 U. S. 628, as explained in *Texas & Pacific R. Co.* v. *United States*, 286 U. S. 285, which characterizes the payments involved in *Edwards* v. *Cuba R. Co.* as "contributions to the capital of the railroads." The contributions made to the Cuba Railroad Company, which are closely similar to those involved in the instant case, were not paid in order to make good an impairment of capital, and the Government of Cuba was not a stockholder and did not become one as a result of the contribution.

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[6] The fact that Congress intended that the term "contribution to capital" should include something more than paid-in surplus is indicated by the following excerpt from the Conference Report (H.R. Report No. 1492, 72nd Congress, 1st Session, page 13) on the Revenue Act of 1932: "Amendment No. 44: This amendment provides that where property was acquired by a corporation as a contribution to capital, *as well as where it was acquired as paid-in surplus*, the basis shall be the same as the basis in the hands of the transferor; and the House recedes." (Emphasis supplied.)

In arguing (Br. 47-49) that the inclusion of borrowed capital as a component of invested capital under the World War II excess profits tax was not a real departure from the concept of invested capital under the earlier law, the respondent points to the fact that the law requires an adjustment for interest on the borrowed money. It is true that such an adjustment in the interest deduction is required, but that does not prove that the addition of borrowed capital was not a substantial change from the concept of invested capital under the earlier law. Moreover, borrowed capital is includable in invested capital, irrespective of whether interest was paid or payable.

Respondent argues (Br. 49-56) that the legislative history of the invested capital provisions of the World War II excess profits tax shows that the concept of invested capital under the later law is the same as under the earlier law, citing in support of that argument certain statements contained in Senator La Follette's Minority Report (S. Rep. No. 2114, Part 2, 76th Congress, 3rd Session). Senator La Follette had proposed an excess profits tax which was different from that adopted by Congress and which was designed to be a permanent feature of our tax system. His draft contained substantially the same concept of invested capital as existed under the earlier law but modified in a number of particulars. However, his views were rejected and Congress adopted a different concept. His entire Minority Report is an attempt to demonstrate that his proposal was superior to the concept proposed by the majority and later adopted by Congress. The statements in his Minority Report shed no light on the issue here involved.

Respondent's argument (Br. 56-60) that equity invested capital does not include all "working capital", is answered by the observation of this Court in *Commissioner* v. *South Texas Lumber Company*, 333 U. S. 496, 497, that with minor exceptions the excess profits tax is imposed on

"all annual net income in excess of 8% of a corporation's *working capital*, including its accumulated profits." (Emphasis supplied.)

Respondent argues (Br. 60-61) that the underlying purpose of the excess profits tax law supports his contention that the contributions of $971,031.01 should be excluded from invested capital. The exact contrary is true. The underlying purpose of the law supports petitioner's position. That purpose, as stated by this Court, was "to tax abnormally high profits due to large governmental expenditures about to be made from appropriations for national defense". *Commissioner* v. *South Texas Lumber Co.*, *supra*. The contributions here involved have no relation whatever to the large governmental expenditures made in connection with the defense and war program. The income earned by petitioner with those contributions was part of petitioner's normal income. If the contributions are excluded from petitioner's invested capital, that income will be taxed at the excess profits tax rates as excessive income, though it clearly does not fall in that category.

2. *The Earnings and Profits Argument*

In arguing that the contributions here involved are not includable in petitioner's equity invested capital as "accumulated earnings and profits" (Br. 61-69), respondent confuses the deferment or nonrecognition of income which will eventually be taxable with the receipt of nontaxable items. The difference in the effect on "earnings and profits" between the receipt of items which are not taxable at any time, and deferred installment profits or unearned premium on insurance, or nonrecognized gains and losses within the purview of Section 112 of the Internal Revenue Code, was pointed out at page 43 of petitioner's original brief. That difference clearly appears in the Commissioner's Regula-

tions promulgated under Section 115 of the Internal Revenue Code.[7]

Respondent argues (Br. 63-65) that the adoption of Section 115 (l) is a clear expression of a congressional intent to provide that gain will not affect earnings and profits until it has been recognized in the computation of income. However, he fails to note that Section 115 (l) relates specifically to nonrecognized gain which will be subjected to tax eventually, and was adopted in order to give legislative sanction to that portion of the Regulations which had been overruled in *Commissioner* v. *F. J. Young Corporation, et al.*, 103 F. 2d 137 (affg. 35 B. T. A. 860), as pointed out on pages 48 and 49 of petitioner's original brief. This Court held in *Commissioner* v. *Wheeler*, 324 U. S. 542, that the Commissioner's Regulations were valid and that the legislation was in effect unnecessary. Nothing in Section 115 (l) provides that an item which is not taxable at any time may not be included in "earnings and profits". Any such provision would have overruled the Commissioner's Regulations which have long provided that items not taxable to the corporation when received, nevertheless constitute part of the corporation's "earnings and profits" if the receipt of such items increases the corporation's surplus (Section 29.115-3, Regulations 111, and corresponding provisions of prior Regulations).[8]

This Court observed in *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98, 103, that the payments there involved, although not taxed when received, increased that corporation's surplus, stating:

> . . . The receipts have gone, so far as here involved, to add to the Company's surplus. They have

[7] Set out on pp. 76 to 78 of petitioner's original brief.

[8] The relevant portion of this Regulation appears at pages 76 to 78 of petitioner's original brief.

not been taxed as income, presumably because it has been thought to be precluded by this Court's decisions in Edwards v. Cuba R. Co., 268 U. S. 628 * * *".

In an effort to avoid the conclusion, which logically follows from his argument that the amounts here involved do not constitute part of petitioner's "earnings and profits" —namely, that a distribution of the surplus created by the receipt of the contributions would be tax free in the hands of petitioner's stockholders—respondent contends (Br. 67-69) that an amount equivalent to the value of the properties will be recouped in earnings and profits through the natural process of use of the properties without a depreciation allowance, or, in the event of sale, by the taxation of the profit with no basis for computing gain or loss. This argument confuses assets with surplus. The surplus is the excess of the value of the assets on the asset side of petitioner's balance sheet over its liabilities, including capital stock. *Helvering* v. *Canfield*, 291 U. S. 163, 166, *Willcutts* v. *Milton Dairy Company*, 275 U. S. 215, 218, *Edwards* v. *Douglas*, 269 U. S. 204, 214. Thus, when the money and property other than money were received, petitioner's surplus was immediately increased by a corresponding amount. The surplus thus created became available for distribution as a dividend. The dividend need, of course, not be distributed in the form in which the asset was received. Neither the exact dollars received from the communities nor the property other than money received from the communities have to be distributed as such. The composition of "earnings and profits" for the purpose of determining the taxable status of a dividend is not dependent upon the ability to segregate and identify the various items entering into "earnings and profits".

If, instead of using the two buildings until their useful life had been exhausted or instead of selling them, petitioner should distribute them in kind to its stockholders, after it has fulfilled the conditions of the contracts under which they

were received, and if petitioner had at that time no other earnings and profits accumulated subsequent to March 1, 1913, would the distribution in kind relieve petitioner's stockholders of tax on the distribution? Respondent fails to answer this question but it may be safely assumed that he would contend that such distribution represented a distribution of petitioner's "earnings and profits". If that be true for the purpose of determining the taxable status of the distribution in the hands of petitioner's stockholders, then it is also true for the purpose of determining petitioner's "accumulated earnings and profits" under Section 718(a)(4) of the Internal Revenue Code.

II. The Depreciation Issues

Respondent's argument of the depreciation issues is found at pages 13 to 28, inclusive, of his brief.

Respondent's entire argument on the depreciation issues is grounded upon this Court's decision in *Detroit Edison Company* v. *Commissioner, supra.* In substance, respondent's contention is that the decision of this Court in the *Detroit Edison Company* case has abrogated the provisions of Sections 113(a)(2) and 113(a)(8)(B). Although his brief is silent on the point, the same conclusion would logically apply to the provisions of Section 113(a)(5), which gives to the devisee of property transmitted at death a new basis other than cost to the taxpayer. Respondent's position on the effect of this Court's decision in the *Detroit Edison Company* case is summarized in the following excerpt from page 17 of his brief:

> "But, in the taxable years here involved, the taxpayer (no replacement costs having yet been paid by it—at least insofar as material here) is entitled only to depreciation deductions limited to its own cost of its property under Section 113(a) * * *. This is clearly the result required under Section 113(a), as interpreted by this Court in the *Detroit Edison* case."

If this Court did intend to hold in the *Detroit Edison Company* case that a taxpayer is entitled to depreciation deductions only if the property in question has cost to him, then respondent's argument would be correct. However, petitioner believes that this Court did not intend to make any such sweeping decision in the *Detroit Edison Company* case, and that the facts here involved are so different from those in that case as to make that case inapplicable here.

Congress has clearly evidenced an intention to permit taxpayers a deduction for depreciation on property having no cost to them, in certain instances. Section 113(a) of the Internal Revenue Code and corresponding sections of prior revenue acts provide that "the basis of property shall be the cost of such property *except that* (emphasis supplied)," and then list a number of exceptions to the general rule that the basis shall be cost. Among those exceptions are Section 113(a) (2) which deals with property received as a gift, 113(a) (5), which deals with property transmitted at death, and 113(a) (8) (B), which deals with property received as paid-in surplus, or as a contribution to capital. The taxpayer, who receives property as a gift, has no cost. Nevertheless, Congress has provided that such taxpayer is entitled to depreciation on the basis of the property in the hands of the donor, or the last preceding owner by whom it was not acquired by gift. Section 113(a) (2), I.R.C.[3]

The taxpayer, who receives property transmitted by death, has no cost. Nevertheless, Congress has provided that such taxpayer may deduct depreciation on the property in question on the basis of the fair market value of such property at the time of such acquisition. Section 113(a)(5) I.R.C.

[3] This rule applies to property received as a gift after December 31, 1920. Fair market value of the property at the date of the gift is the basis for property received as a gift prior to January 1, 1921 (Sec. 113(a)(4), I.R.C.).

The corporate taxpayer, which receives property as paid-in surplus or as a contribution to capital, has no cost. Nevertheless, Congress has provided that such taxpayer may deduct depreciation on such property on its basis in the hands of the transferor. Section 113(a)(8)(B), I.R.C.

Thus, it is apparent that Congress did not intend and has not provided that a taxpayer's depreciation is limited to its cost of the property in all instances. The real question is whether the contributions here involved constitute gifts within the meaning of Section 113(a)(2), or contributions to capital within the meaning of Section 113(a)(8)(B).

Respondent answers petitioner's argument that the contributions here involved constitute gifts or contributions to capital within the meaning of Sections 113(a)(2) or (8) of the Code by stating that the taxpayer in the *Detroit Edison Company* case likewise contended that the contributions there involved constituted gifts or contributions to capital and that such contention was rejected by this Court (Br. 18-19). However, that does not prove that the contributions here involved were not gifts or contributions to capital. In the *Detroit Edison Company* case the recipient was in the business of selling electricity and required the contributions from its prospective customers, as a condition to providing them with its service. The customer, who made the payment and secured the line extension, had a continuing interest in the extension and had a right to demand continued service from the utility company for the indefinite future.

This Court held that the payments were to the customer the price of the service, and that the customer did not intend to give the utility company anything, or to make any contribution to its capital. That is an indisputable fact and not a mere gratuitous observation by this Court, as respondent contends (Br. 19). The only way in which the customer could obtain the service offered by the utility company was

to make the payment required by the company as a condition to the extension of its line to his home or place of business. Had he been able to obtain the service without making the payment, he would not have made it.

In an effort to spell out a comparison of the contributions in the instant case with the payment exacted by the utility company in the *Detroit Edison Company* case, respondent argues (Br. 21-22) that the contributors in the instant case must have had some reason for making the contributions and that such reason must have been an expected benefit to the particular community. Consequently, he argues, since there was some reason for making the contribution, it cannot qualify as a gift or a contribution to capital within the meaning of Section 113(a)(2) or (8). If that test were valid, there could never be a gift or contribution to capital. Every donor of a gift has some reason for making it. The contributor to a community chest or to the endowment fund of a school expects to have the community benefit from his gift, and where his contribution is made in consideration of similar gifts by others, receives sufficient consideration to sustain a contract. Nevertheless, such a contribution is regarded as a gift in the tax sense.

In Edwards v. *Cuba R. Co.*, *supra*, the contributions there involved were made in exchange for very definite consideration, including among other things a reduction in mail pay, but this Court held, as indicated in *Texas & Pacific Railway Co.* v. *United States*, *supra*, that such contributions represented gifts or contributions to the capital of the railroad.[10]

The contributions here involved were just as much gifts or contributions to the capital of the petitioner as are the contributions made by the average contributor to a community chest or school endowment fund. Here the contributors had no business dealings or contractual relations

[10] This point is discussed at pages 27 and 28 of petitioner's original brief.

with petitioner other than that which resulted from the making of the contributions. They were not seeking any service from petitioner, or employment by petitioner, nor right to purchase any goods from petitioner. The contributions were made in a complete "arm's length" transaction with no compulsion whatever on the part of the contributor. The contracts between petitioner and the contributing groups are replete with expressions of goodwill on the part of the contributing groups clearly indicating that they intended to convey to petitioner an economic benefit or gain, and that petitioner should enjoy the fruits of such gain. Nothing more could be asked of the maker of a gift or of a contribution to capital.

Respondent argues (Br. 17) that if any doubt remains as to whether the contributions here involved constitute gifts or contributions to capital under Section 113(a)(2) or (8), the matter is completely dispelled by the provisions contained in Section 113(b)(1)(A), which require that the contributions received by the petitioner with respect to its buildings and equipment be charged against the cost thereof as "receipts * * *" properly chargeable to capital account." This begs the entire question. As observed by this Court in the *Detroit Edison Company* case (p. 101), the expenditures, receipts or losses are chargeable to capital account "except in the case of certain gifts, transfers as paid in surplus, or contributions to capital". If the contributions here involved constitute gifts or contributions to capital, the adjustments required under Section 113(b)(1)(A) are not applicable to the contributions as such, but the fact that Section 113(b)(1)(A) requires such adjustments in certain instances does not prove that the contributions in question are not gifts or contributions to capital within the meaning of Section 113(a)(2) or (8). It should also be noted that the basis of the two buildings under Section 113(b) has been covered by stipulation in the instant case (R. 32).

The respondent's argument (Br. 26-28) against petitioner's alternative contention that if the cash received from the communities is to be allocated against the cost of the new or enlarged factories in the particular communities, then part of the contribution should be allocated to the cost of training new employees and the cost of providing opening inventories, is directly contrary to his earlier argument that the establishment and operation of the factories was to the communities the price of the contributions.[11] Assuming *arguendo* that the consideration for the contribution was the establishment and operation of the factories in the particular communities, then it would seem self-evident that the contribution should be allocated against all of the consideration and not merely part of it. The training of new employees and the providing of opening inventories were essential to the operation of the factories.

Conclusion

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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[11] See his brief p. 3 where he states that the contributions were made to the petitioner for constructing or enlarging a factory "and operating it in the particular community."